overwhelming mass of authority for the proposition that the legality or illegality of a man's arrest does not concern the Court which is trying him. That Court is only concerned with the charge brought against him; he has his remedy for the illegal arrest elsewhere.

Secondly, it is argued that the documents which were found during the search should not have been put in evidence against him, because the police were not in legal possession of them. It was stated that they were really the stolen property of the accused. Here again I have come to the conclusion that the manner in which the police obtained possession of these documents does not concern the Magistrate who is trying the accused; he is only concerned with their relevancy.

Then Mr. Dunford Wood argued with considerable force, that the evidence is not sufficient to support the charge against the accused. He argued that the two witnesses Thangavelu and Mydin should have been treated as accomplices, and that there is no corroboration of their evidence. In regard to Thangavelu and Mydin I am inclined to agree with Mr. Dunford Wood's contention. I think they were accomplices, but I cannot agree that there was no evidence to corroborate them. The marked note was corroboration; the accused's conduct in swallowing a number of bits of paper was also corroboration; and so too were the note books and other documents found in his room. The accused's evidence in the Court below is certainly far from convincing. He made far too many denials. He denied that Thangavelu came to his house. He denied that he knew Mydin; he denied that he had swallowed any bits of paper and he even denied that he vomited. He had to admit the marked note was in his pocket, but he stated that he did not know how it got there. Taking the evidence as a whole, I think that it was sufficient to support the conviction, in other words I cannot see that the learned Magistrate was wrong in fact. He took the view that this place was open to a class of the public for the purpose of betting and wagering, and, I think, the Tamil population of Ipoh, or even a section of such population, can properly be regarded as a class of the public. He also took the view that the room had been used for habitual betting or wagering. I am not prepared to say that he was wrong in taking that view. I think that a Magistrate or Jury could reasonably have come to that conclusion on the evidence in this case, though I doubt whether I myself would have arrived at the same conclusion. The appeal must be dismissed.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C. J., WHITLEY & AITKEN, JJ.

November 27, 1936.

ONG EE LIM.....Plaintiff-Appellant.

v.

THE GOVERNMENT OF THE FEDERATED MALAY STATES...Defendants-Respondents.

[SELANGOR CIVIL APPEAL No. 13 of 1936.]

Pleadings—The Civil Procedure Code (Cap. 7) section 42—Action against Government—The Government Suits Enactment (Cap. 17) section 10—The Public Authorities Protection Enactment (Cap. 30) section 2—Doctrine of "res ipsa loquitur."

The plaintiff-appellant, the managing proprietor of the Prince's and Coliseum Theatres, Kuala Lumpur, claimed damages against the defendants-respondents for the destruction by fire of certain reels of films whilst they were being examined by an Assistant Commissioner of Police at the Central Police Station, Kuala Lumpur.

The material parts of the plaint were as follows:—

"2. For several years now the plaintiff has been required by the defendant to produce to the Officer in Charge of the Police District the films, each and every, that he had arranged to exhibit at any of his two said theatres, at the office of the Officer in charge of the Police District at the Central Police Station Kuala Lumpur, for the purpose of the said officer being satisfied among other things that the said films so arranged to be exhibited had been passed as fit for exhibition in the States by the Official Censor at Singapore.

3. In accordance with such requirement on the 24th day of September 1935 the plaintiff caused to be produced at the Central Police Station, Kuala Lumpur, the first reel of the film entitled 'In Caliente' together with other reels making up the 'shorts' usually presented on the screen before the main feature.

4. On the said 24th day of September 1935 the Officer of the defendant who examined these films was a Mr. H. F. Ridley, Assistant Commissioner of Police, Federated Malay States.

5. During the examination there was a sudden blaze of fire and several lengths of the said films were destroyed.

6. The plaintiff has in consequence been put to considerable loss and expense by having to pay for the films destroyed for screening other pictures and he claims against the defendant the sum of $1,229.45 as damages.....".

The written statement of defence was as follows:—

"1. Paragraph 1 of the plaint is admitted.

2. Paragraph 2 of the plaint is admitted in so far as it relates to the production of the said films for the purpose of satisfying the Officer in charge of the Police District Kuala Lumpur, that the said films had been passed as fit for exhibition in the Federated Malay States by the Official Censor at Singapore but it is denied that the said films were produced for any other purpose.

3. Paragraphs 3, 4 and 5 are admitted.

4. The defendant will submit that the plaint discloses no cause of action.....".

The Plaintiff-appellant contended that he was in the position of a bailor invitee. He relied on the doctrine of *res ipsa loquitur* and submitted that it was unnecessary for him to plead negligence.

The defendants-respondents contended that the plaint disclosed no cause of action because by the general law of pleadings in a case in which negligence is relied on it must be pleaded and secondly that as this was an action against Government the provisions of the Public Authorities Protection Enactment (Cap. 30) applied by virtue of section 10 of the Government Suits Enactment (Cap. 17).

Held, that the doctrine of *res ipsa loquitur* is a rule of evidence and not a rule of pleading and that under section 42 of the Civil Procedure Code (Cap. 7) a plaintiff alleging a contract of bailment and negligence must plead such a contract and must also plead negligence.

Held further, that sub-sections (i) and (ii) of section 2 of the Public Authorities Protection Enactment (Cap. 30) apply to suits in tort against Government by virtue of section 10 of the Government Suits Enactment (Cap. 17) and therefore in any suit against Government founded on the tortious act of one of its officers malice or negligence and absence of reasonable and probable cause must be expressly alleged in the plaint.

Decision of Pedlow, J. affirmed.

Cheah Cheong Pheng v. *Government of the Federated Malay States*, (1935) F.M.S.L.R. 367; 4 M. L. J. 146.

V. D. Knowles (with him *R. Ramani*) for the plaintiff-appellant: There is a cause of action shown on the plaint: *Read* v. *Brown*, 22 Q.B.D. 128. All the facts stated in the plaint are admitted by the defendants-respondents and therefore it is admitted that they were in possession of the films. Plaintiff-appellant's position is that of a bailor invitee. The films were destroyed by fire whilst in the possession of the defendants-respondents and therefore the doctrine of *res ipsa loquitur* applies, which absolves the plaintiff-appellant from pleading negligence. A contract is established on the pleadings because it is admitted that the plaintiff-appellant had to produce his films. When so produced there is a contract that the defendants-respondents will look after the films with reasonable care and return them to the plaintiff-appellant.

The Public Authorities Protection Enactment (Cap. 30) and the Government Suits Enactment (Cap. 17) were not pleaded in the written statement of defence. In any event sub-section (ii) of section 2 of the Public Authorities Protection Enactment does not apply to suits against Government. If it did apply it would have the effect of leaving subjects without a legal remedy: *Attorney General, Straits Settlements* v. *Pang Ah Yew*, (1925) A.C. 555.

H. C. Willan, Deputy Legal Adviser, for the defendants-respondents: It is clear that the issue is one of negligence and negligence must be pleaded. Negligence is one of the facts which must be included in the statement of circumstances—see section 42 (i) (d) Civil Procedure Code (Cap. 7). From the plaint it is impossible to say whether cause of action is in contract or tort. No bailment is admitted on the pleadings because it is not admitted the films were delivered to the defendants-respondents. For a bailment to be created there must be delivery—see section 148 Contract Enactment (Cap. 52).

The doctrine of *res ipsa loquitur* is a rule of evidence not of pleading. In every case in which the doctrine of *res ipsa loquitur* was applied the plaint alleged negligence—see *Scott* v. *St. Katherine's Docks Co.*, 159 E.R. 665 and *Bryne* v. *Boadle*, 159 E.R. 299.

The Government Suits Enactment and the Public Authorities Protection Enactment were not pleaded because the plaint is so vague. By section 10 of the Government Suits Enactment the provisions of the Public Authorities Protection Enactment apply and Government has same rights as if the officer had been sued personally. No need for a subject to obtain a fiat to sue Government and that being so Government must be afforded the same protection as is afforded to its officers. The trial Judge followed the decision in *Cheah Cheong Pheng* v. *Government of the Federated Malay States*, (1935) F.M.S.L.R. 36; 4 M.L.J. 146 and that decision is correct.

V. D. Knowles in reply.

Cur. Ad. Vult.

TERRELL, AG. C.J.—This appeal turns entirely upon the form of the pleadings. The plaint and written statement are as follows:—

"....2. For several years now the plaintiff had been required by the defendant to produce to the officer in charge of the police district the films, each and every, that he had arranged to exhibit at any of his two said theatres, at the office of the officer in charge of the police district at the Central Police Station, Kuala Lumpur, for the purpose of the said officer being satisfied among other things that the said films so arranged to be exhibited had been passed as fit for exhibition in the States by the Official Censor at Singapore.

3. In accordance with such requirement on the 24th day of September, 1935 the plaintiff caused to be produced at the Central Police Station, Kuala Lumpur, the first reel of the film entitled 'In Caliente' together with other reels making up the 'shorts' usually presented on the screen before the main feature.

....5. During the examination there was a sudden blaze of fire and several lengths of the said films were destroyed.

6. The plaintiff has in consequence been put to considerable loss and expense by having to pay for the films destroyed to the producers and to make other arrangements for screening other pictures and he claims against the defendant the sum of $1,229.45 as damages. ....."

The defendant states as follows:—

"2. Paragraph 2 of the plaint is admitted in so far as it relates to the production

of the said films for the purpose of satisfying the officer in charge of the police district, Kuala Lumpur, that the said films had been passed as fit for exhibition in the Federated Malay States by the Official Censor at Singapore but it is denied that the said films were produced for any other purpose.

3. Paragraphs 3, 4 and 5 are admitted.

4. The defendant will submit that the plaint discloses no cause of action. ...."

It will be seen that the plaintiff has alleged no cause of action, and the objection was raised by the defendants at an early stage of the hearing before Pedlow, J. In opening his case Mr. Knowles for the plaintiff-appellant argued that the Government were bailees within the meaning of the Contract Enactment. It is not quite clear whether Mr. Knowles also alleged 'negligence.' In the notes of argument, he is recorded as having said "I do not allege negligence," but this may only mean that Mr. Knowles did not consider it necessary as to allege. He argued that the doctrine '*res ipsa loquitur*' made it superfluous to allege any particular cause of action; but from the authorities cited before the Court of Appeal it appeared to be obvious that negligence was one of the issues which the plaintiff intended to raise.

In reply to Mr. Knowles' argument the Deputy Legal Adviser set up *inter alia* the Government Suits Enactment (Cap. 17), and the Public Authorities Protection Enactment (Cap. 30). The learned trial Judge found that the averments rendered necessary by these Enactments having been omitted, the plaint disclosed no cause of action. The plaintiff was given the opportunity of amending his plaint upon terms within one month, in default, the action to stand dismissed. The Plaintiff did not elect to amend but has appealed to the Court of Appeal against the order dismissing the action.

I take it that the object of pleadings is to place the issues fairly and fully before the Court, and to give the other side notice of the case which they have to meet. Admittedly the rules of pleading contained in the Civil Procedure Code are very inadequate, but I consider that the general principles which prevail in England should be applied by virtue of section 42 (i) (d) of the Civil Procedure Code, which requires the plaint to contain

> "a plain and concise statement of the circumstances constituting the cause of action and where and when it arose."

It cannot, I think, be doubted that if plaintiff alleges a contract of bailment, that is a circumstance that should be pleaded. So also negligence is a fact which should be pleaded. Or again, if the plaintiff alleges a breach of a statutory or contractual duty, the duty relied on should be stated. The doctrine of '*res ipsa loquitur*' is a rule of evidence, not a rule of pleading, and the particular causes of action should be pleaded, and can if necessary be pleaded in the alternative.

The plaintiff complains that the Enactments upon which he relies should have been set out in the written statement, but the Court will have little sympathy for a plaintiff who deliberately leaves the defendants in doubt as to the case he intends to set up, and then objects that the defendants have not specifically set out the grounds of his defence. The rules of pleading as regards written statements are even more perfunctory than those which apply to a plaint. Section 91 provides that the parties "may tender written statements of their respective cases," and section 95 requires that such written statements

> "shall be as brief as the nature of the case admits, and shall not be argumentative, but shall be confined as much as possible to a simple narration of the facts which the party by whom or on whose behalf the written statement is made believes to be material to the case, and which he either admits or believes he will be able to prove."

There is no section in the Code corresponding to English Or. 19 r. 15 which requires a defendant to state certain statutory defences and "all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise." In view of the absence of any such provision it is doubtful whether the defendant could strictly be required to set up the provisions of Chapters 17 and 30, upon which he relies if the claim is based on negligence or any other form of tort, but the Deputy Legal Adviser informed the Court, that he would not have relied on the absence of any provision such as Or.19 r.15, but would have specifically pleaded the Enactments, if he could have been certain what was the case he was required to meet.

In the result, therefore, I find that the plaint is defective and discloses no cause of action and that, failing amendment, the suit must be dismissed.

The learned trial Judge based his decision mainly on the provisions of Chapters 17 and 30, followed the decision of Howes J. in *Cheah Cheong Pheng* v. *Government of the Federated Malay States*, (1935) F.M.S.L.R. 36; 4 M.L.J. 146. This case decided shortly that in matters of tort the Government was only liable in cases in which proceedings for damages would have lain against the public officer whose conduct is complained of (section 10 (ii) (a) of the Government Suits Enactment). Mr. Knowles admitted that this provision by inference incorporated

section 2 (i) (a) & (b) of the Public Authorities Protection Enactment, which reads as follows:—

> "The action, prosecution or proceeding shall not lie or be instituted unless—
>
> (a) one month's previous notice in writing of the intended action and of the cause thereof is given to the defendant;
>
> (b) it is commenced within three months next after the act, neglect or default complained of or in case of a continuance of injury or damage within three months next after the ceasing thereof."

Now a suit can only be commenced by filing a plaint, and section 2 (ii) provides that

> "in every action so brought it shall be expressly alleged that the defendant acted maliciously or negligently and without reasonable or probable cause."

From this it would appear to follow that if the plaintiff in this case alleges that the Government of the Federated Malay States was guilty of negligence, before that claim can be established the plaint must contain an averment that Mr. Ridley acted negligently and without reasonable or probable cause. The words 'reasonable and probable cause' are of course usually found in connection with an allegation of malice, (see the Public Authorities Protection Ordinance of the Colony, section 2 (3)), and they are certainly not very applicable to an allegation of negligence. However, the word 'negligently' was included in the sub-section when Cap. 30 was introduced in 1929, and possibly some meaning must be attributed to the words "reasonable and probable cause" as qualifying or explaining the word 'negligently.' With this I am not concerned at the moment, but I am satisfied that if negligence is alleged, the interpretation placed upon section 10 (ii) (a) by the learned trial Judge, following the decision of Howes, J., is correct.

I need only add that the authorities relied on by Mr. Knowles as touching the liability of Government for the wrongful acts of their servants have no application. Section 10 of the Government Suits Enactment is entirely different to the provisions of the Crown Suits Ordinance of the Colony, and accordingly the case of *The Attorney General* v. *Pang Ah Yew*, (1925) A.C. 555, and the cases therein referred to are of no assistance. The local case of *Naested* v. *State of Perak*, 5 F.M.S.L.R. 185, likewise has no application as it only decided that the State was not a 'person' within the meaning of the Public Authorities Protection Enactment, a matter which is not in issue in the present case.

I would accordingly dismiss the appeal with costs. The appellant has applied that in the event of his appeal being dismissed he should be given an opportunity to amend his plaint. I think that the plaintiff should be allowed to do so on terms, and that the terms should be that the plaintiff pay the costs of the appeal and the costs thrown away as indicated on page 14 of the record. Upon failure to pay such costs within one month of taxation the action should stand dismissed. The defendants should have liberty to amend their defence within 14 days after being served with the amended plaint if any. The deposit should be paid out to the defendants on account of their taxed costs.

WHITLEY, J.—The plaintiff-appellant is the managing proprietor of the Prince's and Coliseum Theatres, Kuala Lumpur, and the defendants-respondents are the Government of the Federated Malay States. The claim is for damages alleged to have been sustained by reason of the destruction by fire of certain reels of films whilst they were at the Central Police Station, Kuala Lumpur, for the purpose of examination by Mr. Ridley, Assistant Commissioner of Police. The defendants in their written statement submitted that the plaint disclosed no cause of action, and after hearing argument by counsel Pedlow, J., agreed with that submission, and made the order appealed against.

The material paragraphs of the plaint are as follows:—

> "2. For several years now the plaintiff has been required by the defendant to produce to the Officer in Charge of the Police District the films, each and every, that he had arranged to exhibit at any of his two said theatres, at the office of the Officer in charge of the Police District at the Central Police Station Kuala Lumpur, for the purpose of the said officer being satisfied among other things that the said films so arranged to be exhibited had been passed as fit for exhibition in the States by the Official Censor at Singapore.
>
> 3. In accordance with such requirement on the 24th day of September 1935 the plaintiff caused to be produced at the Central Police Station, Kuala Lumpur, the first reel of the film entitled 'In Caliente' together with other reels making up the 'shorts' usually presented on the screen before the main feature.
>
> 4. On the said 24th day of September 1935 the officer of the defendant who examined these films was a Mr. H. F. Ridley, Assistant Commissioner of Police, Federated Malay States.
>
> 5. During the examination there was a sudden blaze of fire and several lengths of the said films were destroyed.
>
> 6. The plaintiff has in consequence been put to considerable loss and expense by having to pay for the films destroyed to the producers and to make other arrangements for screening other pictures and he

claims against the defendant the sum of $1,229.45 as damages....."

The written statement of defence reads as follows:—

"1. Paragraph 1 of the plaint is admitted.

2. Paragraph 2 of the plaint is admitted in so far as it relates to the production of the said films for the purpose of satisfying the Officer in charge of the Police District, Kuala Lumpur, that the said films had been passed as fit for exhibition in the Federated Malay States by the Official Censor at Singapore but it is denied that the said films were produced for any other purpose.

3. Paragraphs 3, 4 and 5 are admitted.

4. The defendant will submit that the plaint discloses no cause of action....."

Before the learned trial Judge Mr. Knowles put the plaintiff's case as that of a bailor invitee, using the word invitee in its legal sense, who, as required by the defendants, produced the films to the officer appointed by the defendants in whose possession they were when they were destroyed by fire. He relied upon the doctrine of "res ipsa loquitur," and submitted that the burden of proof was upon the bailee to disprove negligence.

Mr. Willan, the Deputy Legal Adviser, advanced two distinct grounds for holding that the plaint discloses no cause of action. The first was based upon the general law of pleading. He complained that the plaint does not disclose whether he is being sued in contract or in tort, and that it was not until the trial opened that the position of the plaintiff was defined as that of a bailor invitee.

In my opinion this complaint is well founded. I must confess that when I read the plaint it struck me as a remarkable piece of pleading; I was left with the impression that the vital paragraph had been inadvertently omitted, which would have shown exactly how it was sought to fix the defendants with liability. It would appear, however, that the plaintiff's advisers designedly left matters in this nebulous state, contending that the plaint as it stands sufficiently complies with the requirements of the rules of pleading. In my opinion it does not. Section 42 (i) (d) of the Civil Procedure Code provides that the plaint shall contain a plain and concise statement of the circumstances constituting the cause of action. The two circumstances upon which the plaintiff principally relies are bailment and negligence. Neither is pleaded. By section 148 of the Contract Enactment bailment is defined as the "delivery" of goods by one person to another for some purpose, and section 149 provides that the delivery may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee. No such delivery to the defendant or parting with possession by the plaintiff is alleged in this plaint. All that paragraph 3 alleges is that the plaintiff caused the films to be produced at the Central Police Station. The word 'produce' means to bring forward, exhibit or show personally. It does not imply any parting with possession—(see *Stroud's* Judicial Dictionary 3rd edition, page 1768).

Similarly negligence is a fact, as appears from section 14 of the Evidence Enactment, and a party intending to rely upon it must allege it even though the negligence upon which he relies falls within the doctrine of 'res ipsa loquitur.' 'Res ipsa loquitur' is a rule of evidence and not of pleading. It is a legal maxim which applies where a *prima facie* case of negligence is raised, calling for an answer from the defendant without any further proof of actual default on his part than is involved in the mere happening of the injurious event.

> "When something happens which would not happen if ordinary care and skill were used, the happening of that is evidence on which a jury may find that there has been negligence on the part of the defendant."

[*Per* Brett, J. *Gee* v. *Metropolitan Railway Co.*, (1873) L.R. 8 Q.B. 175]. A railway collision is the most common example of such a happening. The foundation of any claim in which the plaintiff intends to rely upon this maxim is negligence, and that that must be pleaded is clear from the precedents in *Bullen and Leake*, and from the cases of *Scott* v. *St. Katherine's Dock*, 159 E.R. 665 and *Bryne* v. *Boadle*, 159 E.R. 299. As neither bailment nor negligence are pleaded, I consider that the Deputy Legal Adviser is entitled to succeed on his first ground.

His second ground, and the ground upon which the learned trial Judge based his decision, was that the plaintiff had failed to comply with the provisions of the Government Suits Enactment (Cap.17) and the Public Authorities Protection Enactment (Cap.30). Section 10 (i) of Chapter 17 provides that the Government shall be liable for any neglect or default by the public officer in the same manner and to the same extent as that to which a principal, being a private person, is liable for the neglect or default of his agent.

Section 10 (ii) (a) limits the liability of Government by providing that:—

> "No suit shall lie against the Government in respect of any act, neglect or default committed by any public officer, unless proceedings for damages in respect of that act, neglect or default would have lain against that officer personally."

Chapter 30 lays down when proceedings for damages for negligence will lie against a public officer. Section 2 provides that:—

"Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Enactment or Rules made thereunder or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Enactment, Rules, duty or authority the following provisions shall have effect:—

(i) The action, prosecution or proceeding shall not lie or be instituted unless—
  (a) one month's previous notice in writing of the intended action and of the cause thereof is given to the defendant;
  (b) it is commenced within three months next after the act, neglect or default complained of or in case of a continuance of injury or damage within three months next after the ceasing thereof.

(ii) In every action so brought it shall be expressly alleged that the defendant acted maliciously or negligently and without reasonable or probable cause, and if at the trial the plaintiff shall fail to prove such allegation judgment shall be given for the defendant."

These sections were considered by Howes, J. in *Chean Cheong Pheng* v. *Government of the Federated Malay States*, (1935) F.M.S.L.R. 36; 4 M.L.J. 146, where he held that Chapter 17 conferred on the Government as employer the same privileges when sued in respect of the negligence of an employee as Chapter 30 conferred on the employee himself. Pedlow, J. decided to follow this ruling, and accordingly held that unless the plaintiff in the present suit alleges that the defendant through his servant acted 'maliciously or negligently and without reasonable and probable cause' he discloses no cause of action.

Mr. Knowles invited us to hold that Howes, J. was wrong. By an ingenious argument he sought to persuade us that section 2 (i) of Chapter 30 is, so to speak, self-contained and comprehensive as to the conditions under which an action will lie against a public servant, and that section 2 (ii) should not be read with it, Section 2 (i), he argued, prescribed when an action will lie, and section 2 (ii) goes on to make provision as to what the plaintiff must do later if and when action is commenced. I find it quite impossible so to divorce sub-section (ii) from sub-section (i) without doing violence to the plain words an obvious intention of the section as a whole. Sub-section (ii) says "in every action so brought." That must mean in every action instituted in accordance with sub-section (i). Section 41 of the Civil Procedure Code provides that every suit shall be instituted by presenting a plaint, so that sub-section (ii) can only mean that malice or negligence must expressly be alleged in the plaint. The intention of the Legislature in enacting Chapters 17 and 30 seems to me clear, and they have succeeded in adequately expressing that intention. Chapter 30 came into force in 1930, and defined the liability of a public servant for any act or neglect in the course of his duty. Section 10 of Chapter 17 was an amendment introduced in 1932 whereby this liability of the public servant was extended by making Government also liable as principal, and sub-section (ii) (a) limits the new liability of Government by making it co-extensive with that of the public servant.

In my opinion the learned trial Judge was right in following the decision of Howes, J., and the order which he made was in every way a proper one. It follows then that in my opinion the appeal should be dismissed, and I agree with the proposed order of the learned President.

There are two further points which I will deal with shortly. Mr. Knowles took the objection that the defendants ought to have pleaded the two Enactments upon which he relied as special defences, but I agree with the Deputy Legal Adviser that with the plaint so loosely worded it was quite impossible for him to know to what he had to plead. The other point concerns section 2 (ii) of Chapter 30. The reluctance of the plaintiff's counsel to pleading negligence, as it seems to me, is probably due to a mistaken view as to the meaning of that sub-section. He appears to anticipate first a difficulty in framing particulars of negligence if called upon to do so, and secondly a difficulty in affirmatively proving negligence at the trial. But it seems to me that once he has pleaded negligence it will then be open to him to invoke in aid the maxim of 'res ipsa loquitur,' and if he can establish that the circumstances are such as bring the case within the scope of that maxim, he may succeed in his claim without adducing any further proof of negligence; in other words he may be able to show that the circumstances of the destruction of the films constitute in themselves sufficient evidence of negligence just as the mere fact of two trains colliding may in itself amount to conclusive proof of negligence.

In conclusion I would throw out the suggestion that, in view of the further opportunity which we have given to the plaintiff to have his claim tried, this seems eminently a case for an amicable settlement. Whatever the legal position may be, as to which I express no opinion, I feel considerable sympathy for the plaintiff. In taking his films to the police station he merely

did what he was required to do by Government, and if it should prove that the destruction of his films and the consequential financial loss to him was due to no fault on his part, he would clearly have every right to be aggrieved; and he has already become liable for the costs of this appeal by reason of a technical defect in pleading for which he cannot personally be held to blame.

AITKEN, J.—As all the questions agitated in this appeal arose out of the pleadings, it will make for clarity if I set them out in full. Fortunately they are short.

The plaint reads as follows:—

"1. The plaintiff is the managing proprietor of the Prince's and Coliseum Theatres, Kuala Lumpur and his address for service of processes is 47, Cross Street, Kuala Lumpur. The defendant is the Government of the Federated Malay States.

2. For several years now the plaintiff had been required by the defendant to produce to the officer in charge of the Police District the films, each and every, that he had arranged to exhibit at any of his two said theatres, at the office of the officer in charge of the Police District at the Central Police Station, Kuala Lumpur, for the purpose of the said officer being satisfied among other things that the said films so arranged to be exhibited had been passed as fit for exhibition in the States by the Official Censor at Singapore.

3. In accordance with such requirement on the 24th day of September, 1935 the plaintiff caused to be produced at the Central Police Station, Kuala Lumpur the first reel of the film entitled "In Caliente" together with other reels making up the 'Shorts' usually presented on the screen before the main feature.

4. On the said 24th day of September, 1935 the officer of the defendant who examined these films was a Mr. H. F. Ridley, Assistant Commissioner of Police, Federated Malay States.

5. During the examination there was a sudden blaze of fire and several lengths of the said films were destroyed.

6. The plaintiff has in consequence been put to considerable loss and expense by having to pay for the films destroyed to the producers and to make other arrangements for screening other pictures and he claims against the defendant the sum of $1,229.45 as damages.

Particulars of loss and expense:—

(a) Cost of News reel V. 6 No. 32 destroyed - -	$252.30
(b) Cost of Movietone Trailer destroyed - - -	55.00
(c) Cost of Technicolour short and 1st. reel of 'In Caliente' etc: destroyed including postage for new prints obtained - -	731.85
(d) Expenditure and other charges incurred - -	190.30
Total -	$1,229.45

7. The plaintiff's demand for payment has been refused.

Plaintiff prays judgment for $1,229.45 and costs."

The defence reads as follows:—

"1. Paragraph 1 of the plaint is admitted.

2. Paragraph 2 of the plaint is admitted in so far as it relates to the production of the said films for the purpose of satisfying the officer in charge of the Police District, Kuala Lumpur, that the said films had been passed as fit for exhibition in the Federated Malay States by the Official Censor at Singapore but it is denied that the said films were produced for any other purpose.

3. Paragraphs 3, 4 and 5 are admitted

4. The defendant will submit that the plaint discloses no cause of action and prays that the suit may be dismissed with costs."

When the case came on for hearing before Pedlow, J. on the 24th day of September, 1936, no evidence was called but both sides claimed to be entitled to judgment on these pleadings. A prolonged and somewhat diffuse argument ensued, but for the purposes of this appeal it is only necessary to consider two of the propositions which were put forward on behalf of the plaintiff and denied on behalf of the defendants.

The first of these propositions may be stated thus:—it is unnecessary for the plaintiff to plead negligence on the part of the officer concerned, because the facts pleaded speak for themselves and raise a presumption of negligence on his part.

The second may be stated in this way:—

Section 10 (ii) (a) of the Government Suits Enactment (Cap. 17) does not refer to section 2 (ii) of the Public Authorities Protection Enactment (Cap. 30), and so render it necessary to plead that the officer concerned acted "negligently and without reasonable or probable cause."

The learned trial Judge appears to have decided both these questions in favour of the defendants—at any rate he held that the plaint

discloses no cause of action, and must be amended so as to include a pleading of malice or negligence and absence of reasonable or probable cause on the part of the officer concerned, or the suit would be dismissed. He gave the plaintiff leave to amend accordingly within one month on payment of the defendants' costs up to that date, in default of such amendment the suit to be dismissed with costs. Learned counsel for the plaintiff chose to appeal rather than to amend, so both these questions (and several others that really do not concern this appeal) were argued before us at considerable length.

I have never felt any doubt whatsoever about the first of these questions. This suit is admittedly brought against the defendants under and in pursuance of the Government Suits Enactment (Cap. 17). Whatever view may be taken of sub-section (ii) of section 10 of that Enactment, the opening words of sub-section (i) of the same are perfectly clear and unequivocal:—

> "Subject to the provisions of this Enactment the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent....."

In other words, no liability can be fastened upon the Government unless a public officer has been guilty of (1) a wrongful act, or (2) a neglect or (3) a default. It follows, therefore, that such a wrongful act, or neglect or default on the part of a public officer must be proved or admitted before the plaintiff can establish his right to judgment against the Government; and whether or no any such wrongful act, neglect or default occurred is always a question of fact. Unless a plaint alleges one or more of these three instances of tortious conduct, I cannot see how it can be said to disclose a cause of action as that phrase was defined in *Cooke* v. *Gill*, 8 C.P. 107. Even our lax rules of pleading insist on a plaint containing, *inter alia*, a plain and concise statement of the circumstances constituting a cause of action—see section 42 (i) (d) of the Civil Procedure Code, and in this particular case if negligence is not one of the circumstances constituting the cause of action, I am quite unable to understand what does constitute it. As to the argument that "res ipsa loquitur" applies to the plaint in this case, it is scarcely necessary to say more than that "res ipsa loquitur" is a rule of evidence and not of pleading. I have, however, made a point of looking up a considerable number of leading cases in which this rule has been applied, and in every one of them negligence was pleaded. When I asked Mr. Knowles if he could give me a single case in which "res ipsa loquitur" was held to apply without negligence having been pleaded, he referred me to the Indian case of *Nanku Ram* v. *The Indian Midland Railway Co.*, I.L.R. 22 All. 361. I have read the report of that case carefully, and have come to the conclusion that it has no bearing on the question with which I am now dealing. In that case goods were destroyed whilst in the custody of an Indian Railway Company for purposes of carriage, and section 76 of the relevant Act provided that in any suit against a railway administration for compensation for loss or destruction of goods delivered to it for carriage, it shall not be necessary for the plaintiff to prove how the loss or destruction was caused. The Court therefore held that it was sufficient for the plaintiff to prove delivery of the goods to the Railway Company, and the facts that the goods were destroyed whilst in its custody. These facts being admitted it was for the Railway Company to establish that they had taken due care of the goods. In point of fact it would seem that the plaintiff in that case did plead negligence, though without specifying any specific act of negligence; but be that as it may that case and this are as poles asunder. In that case the Railway Company was made liable by statute for loss or destruction of goods committed to their custody for carriage, unless they could prove that neither they nor their servants or agents had been negligent; but in this case the Government is exonerated from all liability unless the plaintiff can prove negligence on the part of the officer concerned. How then can that case be any authority to show how the plaintiff should plead in this case? Mr. Knowles omitted to explain how it could.

Turning now to the second of the two questions awaiting our decision, I agree that when one comes to construe the provisions of section 10 (ii) (a) of the Government Suits Enactment, the differences between the phraseology employed in sub-sections (i) and (ii) of section 2 of the Public Authorities Protection Enactment, causes a certain amount of difficulty. The intention of the legislature as expressed in section 10 (ii) (a) of the former Enactment seems to me clear enough; Government is to be under no greater liability for the tortious acts or omissions of its officers than the officers themselves would be. To guage that liability we have to turn to section 2 of the latter Enactment, and sub-section (i) thereof provides that no action shall lie or be instituted against a public officer for alleged tortious conduct in the execution of any kind of public duty unless—

> "(a) one month's previous notice in writing of the intended action and of the cause thereof is given to defendant.
> (b) it is commenced within three months next after the act, neglect or default complained of or in case of continuance

of injury or damage within three months next after the ceasing thereof."

So far it is plain sailing enough, since similar expressions about a suit lying and an action not lying are used in the relevant provisions of each enactment under reference; but sub-section (ii) of the Public Authorities Enactment proceeds to lay down a further condition to be complied with by plaintiffs suing public officers for such alleged tortious conduct in the execution of their duties, and uses language which makes no reference to suits or actions or other proceedings lying or not lying. This sub-section reads as follows:—

" (ii) In every action so brought it shall be expressly alleged that the defendant acted maliciously or negligently and without reasonable or probable cause, and if at the trial the plaintiff shall fail to prove such allegation judgment shall be given for the defendant."

Founding himself upon this difference in language, Mr. Knowles put forward the ingenious argument that an action would lie against Government for any wrongful act, neglect or default committed by a public officer in the course of his official duties, provided that one month's previous notice in writing was given and it was commenced within three months in accordance with the provisions of sub-section (i) of section 2 of the Public Authorities Protection Enactment. He contended that sub-section (ii) of the same section did not apply as its provisions only affected actions etc. which already lay under sub-section (i).

Although the construction contended for by Mr. Knowles would bring about the curious result that the Government would be under an apparently greater liability for any tortious conduct on the part of a public officer in the course of his official duties than the officer himself, and although such a result would accord ill with the plain language of section 10 (ii) (a) of the Government Suits Enactment, yet I should find considerable difficulty in rejecting his argument on this point were he not, in effect, hoist with his own petard. He admits that section 2 (i) (b) of the Public Authorities Protection Enactment applies to all suits brought against the Government under section 10 of the Government Suits Enactment, and under section 42 (i) (a) of the Civil Procedure Code it is the duty of all Courts in the Federated Malay States to reject a plaint if it does not disclose a cause of action. It seems to follow, therefore, that unless the plaint against a public officer for alleged tortious conduct in the course of his official duties complied with sub-section (ii) of section 2 of the Public Authorities Protection Enactment, no action could ever be commenced against him under sub-section (i) (b) of the same. Hence, by necessary implication, it seems to me that sub-section (ii) of section 2 of the Public Authorities Protection Enactment applies to suits against the Government under section 10 of the Government Suits Enactment. I must confess that I do not care to arrive at important conclusions by means of reasoning as subtle as this, but Mr. Knowles's argument is by no means free from subtlety, and the conclusion at which I have arrived appears to be more in accordance with any reasonable view of the intentions of the legislature than would be the case if the construction for which Mr. Knowles so pertinaciously contended were adopted.

For the reasons which I have set out at some length I am of opinion that the learned trial Judge was right in holding that the plaint in this case discloses no cause of action, and I agree with the order proposed by the learned President. I think Mr. Knowles is rather unduly pessimistic as to the provisions of section 2 (ii) of the Public Authorities Protection Enactment. True that in accordance with those provisions he has to prove that the officer concerned acted " negligently and without reasonable or probable cause," but to my mind that does not disable him from relying on the rule " res ipsa loquitur " if that rule does apply to the facts of this case. Moreover, I am not yet satisfied that the burden of proving negligence " without reasonable or probable cause " is any heavier than the ordinary burden of proving negligence. Can it be argued that what would be negligence in the case of a non-official is not negligence in the case of an official, because the latter had some reasonable or probable cause for being negligent in the performance of his official duties? Can an official plead that his negligence in that respect was due to (a) bad headache (not self-induced), or (b) a broken heart for which another was responsible, or (c) an excess of joy consequent upon receiving long deferred promotion? It is not for me to attempt an answer to these questions, but it is obvious that they offer a possible source of merriment, and a rather more than possible reason for doubting whether all the members of the Federal Council which enacted our Public Authorities Protection Enactment understood what they meant by the phrase " negligently and without reasonable or probable cause."

Appeal dismissed.